SREEDEVI NAIDU T SREE RAMALU NAIDU v. EELASEGERAN T NADARAJAH & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: W-02-33-01-2014]
8 MAY 2015

FAMILY LAW: *Divorce – Maintenance – Interim maintenance pending hearing and disposal of petition for dissolution of marriage – Factors to be considered by court in assessing means and needs of parties – Duration of marriage – Whether there were any children – Whether husband financially supported wife during subsistence of marriage – Earning capabilities of parties – Whether divorce would have affected husband's position financially – Law Reform (Marriage and Divorce) Act 1976, s. 102*

FAMILY LAW: *Matrimonial property – Disposal of assets – Petitioner applied for order to restrain/bar husband from selling, mortgaging or charging properties – Whether properties acquired during marriage – Whether there was evidence that husband had or was about to dissipate properties*

The petitioner wife ('the petitioner') filed a petition for the dissolution of her marriage to the first respondent husband ('the first respondent') due to the latter's adulterous relationship with the second respondent. At the High Court, the petitioner applied for the following orders to restrain/bar the first respondent from (i) withdrawing his savings from the Employment Provident Fund ('EPF') until disposal of the petition under s. 102 of the Law Reform (Marriage and Divorce) Act 1976; (ii) withdrawing his unit trust; (iii) selling, mortgaging or charging the matrimonial home ('the Semenyih house'); and (iv) selling, mortgaging or charging one unit condominium ('the Capsquare Condominium unit') ('prayers 3(a), 3(c), 4(a) and 4(b)'). The petitioner also sought an order for the first respondent to pay to her interim maintenance in the sum of RM15,000 per month until the hearing of the petition ('prayer 5'). The application was dismissed. Hence, the present appeal.

Held (allowing appeal in part)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The decision of the High Court dismissing prayers 3(a), 3(c), 4(a) and 4(b) was affirmed. (i) The petitioner's prayer to restrain the first respondent from withdrawing his savings from his EPF account was unsustainable in light of s. 51 of the EPF Act 1991 which provides that contributions and deposits are not to be assigned or attached; (ii) there was no evidence to show that the first respondent was about to or had taken any steps to dissipate the unit trust; (iii) the Semenyih house was purchased before the first respondent married the petitioner

and there was no evidence to support the assertion that the first respondent had or was about to dissipate the property; and (iv) the Capsquare Condominium was registered in the joint names of the parties and was also charged to the bank. As such, it was impossible for the first respondent to dissipate the property in question without the consent of the petitioner. (paras 13-16)

(2) The decision of the High Court in dismissing prayer 5 was set aside. The petitioner's needs and means were amply made out on the affidavit evidence. There was a failure by the High Court Judge to appreciate the evidence. However, the petitioner's claim of RM15,000 per month was not entirely justified or reasonable. Based on the circumstances and the means and needs of the petitioner and the first respondent, a monthly sum of RM8,000 was a fair and reasonable sum as interim maintenance pending the hearing and disposal of the petition. (paras 22 & 34)

Bahasa Malaysia *Headnotes*

Pempetisyen isteri ('pempetisyen') telah memfailkan petisyen bagi pembubaran perkahwinannya dengan responden pertama suami ('responden pertama') atas sebab perhubungan zina responden pertama dengan responden kedua. Di Mahkamah Tinggi, pempetisyen memohon perintah-perintah berikut untuk menghalang/menyekat responden pertama daripada (i) mengeluarkan simpanannya dalam Kumpulan Wang Simpanan Pekerja ('KWSP') sehingga pelupusan petisyen di bawah s. 102 Akta Membaharui Undang-undang (Perkahwinan dan Penceraian) 1976; (ii) mengeluarkan unit amanahnya; (iii) menjual, menggadai atau memajak rumah kelamin mereka ('rumah Semenyih'); dan (iv) menjual, menggadai atau memajak satu unit kondominium ('unit Kondominium Capsquare') ('permohonan 3(a), (3c), 4(a) dan 4(b)'). Pempetisyen juga memohon perintah agar responden pertama membayar kepadanya nafkah interim berjumlah RM15,000 sebulan hingga perbicaraan petisyen ('permohonan 5'). Permohonan pempetisyen ditolak. Oleh itu, timbul rayuan ini.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Keputusan Mahkamah Tinggi menolak permohonan 3(a), 3(c), 4(a) dan 4(b) disahkan. (i) Permohonan pempetisyen untuk menghalang responden pertama daripada mengeluarkan simpanannya daripada akaun EPF tidak boleh dipertahankan berdasarkan s. 51 Akta KWSP 1991 yang memperuntukkan bahawa caruman dan deposit tidak boleh diserahhakkan atau dipindahkan; (ii) tiada keterangan yang menunjukkan bahawa responden pertama hendak atau mengambil apa-apa langkah untuk melesapkan unit amanah; (iii) rumah Semenyih dibeli sebelum responden pertama mengahwini pempetisyen dan tiada keterangan yang menyokong dakwaan bahawa responden pertama hendak atau akan melupuskan hartanah tersebut; dan (iv) Kondominium

Capsquare didaftarkan bersama di bawah nama kedua-dua pihak dan juga dipajakkan pada bank. Oleh itu, mustahil buat responden pertama melupuskan hartanah tersebut tanpa kebenaran pempetisyen.

(2) Keputusan Mahkamah Tinggi menolak permohonan 5 diketepikan. Keperluan dan pendapatan pempetisyen dikemukakan lebih daripada cukup dalam afidavit keterangan. Hakim Mahkamah Tinggi gagal mempertimbangkan keterangan tersebut. Walau bagaimanapun, tuntutan pempetisyen sebanyak RM15,000 sebulan tidak berlandaskan alasan yang kuat atau munasabah. Berdasarkan hal keadaan serta pendapatan dan keperluan pempetisyen dan responden pertama, jumlah bulanan sebanyak RM8,000 adalah jumlah nafkah interim yang adil dan munasabah sementara menunggu perbicaraan atau pelupusan petisyen.

Case(s) referred to:
Chung Fui Chu v. Foo Ho Cheng & Another Case [2010] 10 CLJ 93 HC ***(refd)***
Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***
Koay Cheng Eng v. Linda Herawati Santoso [2008] 4 CLJ 105 CA ***(refd)***
Parkunan Achulingam v. Kalaiyarasy Periasamy [2004] 7 CLJ 175 HC ***(refd)***
Shireen Chelliah Thiruchelvam v. Kanagasingam Kandiah [2010] 2 CLJ 736 HC ***(refd)***
V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474 HC ***(refd)***

Legislation referred to:
Employees Provident Fund Act 1991, s. 51(1)(c)
Evidence Act 1950, s. 114(g)
Law Reform (Marriage and Divorce) Act 1976, ss. 77, 92, 102

For the appellant - SR Sreedevi Naidu; M/s SR Naidu & Co
For the respondents - Harvindar Singh; M/s Harvindar Singh & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Divorce Petition No: 33-1026-05-2013 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This appeal relates to a decision of the High Court dismissing the petitioner wife's application for the following orders:

(i) prayer 3(a) – the first respondent husband be restrained and or barred from withdrawing his savings from the Employment Provident Fund ("EPF") until the disposal of the petition under s. 102 of the Law Reform (Marriage and Divorce) Act 1976 ("the LRA 1976");

(ii) prayer 3(c) – the first respondent husband be restrained and or barred from withdrawing his unit trust including those in Unit Trust Public Mutual;

(iii) prayer 4(a) – the first respondent husband be barred from selling, mortgaging or charging the matrimonial home bearing postal address No. 73, Jalan TTS 4, Taman Tasik Semenyih, 43500 Semenyih, Selangor ("the Semenyih house");

(iv) prayer 4(b) – the first respondent husband be barred from selling, mortgaging or charging one unit condominium known as Parcel No. N-23-2 (North wing) type B1 level 23 held under master title Geran No. 70570, Lot 323, Bandar Kuala Lumpur ("the Capsquare Condominium unit"); and

(v) prayer 5 – the first respondent husband pays to the petitioner wife interim maintenance in the sum of RM15,000 per month until the hearing of the petition.

[2] In this judgment, the parties shall be referred to as they were in the court below.

The Salient Facts

[3] The marriage of the petitioner wife and the first respondent husband was registered on 29 June 2010.

[4] During the marriage, the first respondent husband who was an employee of Petronas resided for the most part in Uzbekistan whilst the petitioner wife resided in Malaysia in her home at No. 56, Jalan Prima Saujana 1/2H, Seksyen 1, Taman Prima Saujana, 43000 Kajang, Selangor ("the Kajang house"). The petitioner wife and the first respondent husband lived together for about four months at the Semenyih house.

[5] On 29 May 2013, the petitioner wife filed a petition for the dissolution of the marriage (in which adultery is alleged) citing her husband as the first respondent and one Geetha a/p Ganapathy as the second respondent.

[6] On 31 May 2013, the petitioner wife obtained an interim *ex parte* order restraining the first respondent husband from withdrawing his savings in the EPF account until disposal of the *inter partes* application.

[7] On 5 December 2013, the learned judge after hearing of petitioner wife's *inter partes* application dismissed the same.

Findings Of The High Court

[8] In essence the learned judge's findings may be summarised as follows:

(a) Prayer 3(a) was dismissed as it would offend against the provisions of s. 51(1)(c) of the EPF Act 1991 which provides that no amount standing to the credit of a member of the fund shall be assignable, transferable, liable to be attached, sequestered, levied upon for, or in respect of, any debt of claim whatsoever;

(b) Prayer 3(c) was dismissed on the ground that there is no evidence to show that the first respondent husband is about to or had taken any steps to dissipate the unit trust;

(c) Prayer 4(a) was dismissed on the ground that there is no evidence to show that the first respondent husband is about to or had taken any steps to dissipate the Semenyih house;

(d) Prayer 4(b) was dismissed on the ground that the Capsquare Condominium unit is charged to CIMB Bank and since it is jointly owned by the petitioner wife and the first respondent husband, neither of them can sell the property without the consent of the other. Further there is no evidence of the first respondent husband trying to dissipate the property; and

(e) Prayer 5 was dismissed on the ground that since the petitioner wife alleges adultery in the petition, the court had to decide first the issue of whether the alleged adulterous relationship between the first and second respondents led to the breakdown of the marriage before considering the question whether the petitioner wife is entitled to any maintenance; at any rate, the learned judge also found that the petitioner wife had not given any evidence of her means and needs to justify her claim for RM15,000 per month as interim maintenance (*Shireen Chelliah Thiruchelvam v. Kanagasingam Kandiah* [2010] 2 CLJ 736; *V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474).

Submission Of Parties

[9] The petitioner wife, an advocate and solicitor, appeared in person and argued her appeal without legal counsel. The petitioner wife contended that the documents in support of her claim for interim maintenance showing her means and needs, monthly expenses and computations are contained in her affidavits filed in support of her application. She added that the two cases relied upon by the learned judge and the first respondent are distinguishable on the facts. In support of her claim for interim maintenance, she cited *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721 and *Chung Fui Chu v. Foo Ho Cheng & Another Case* [2010] 10 CLJ 93.

[10] The petitioner wife also submitted that the first respondent withdrew his savings from his EPF account in breach of a court order dated 31 May 2013 which restrained him from doing so. She conceded that the Semenyih house was purchased by the first respondent before the marriage. As for the unit trust, she submitted that notwithstanding giving the notice to produce the first respondent has failed to produce the particulars of his unit trust holdings.

[11] In reply, learned counsel for the first respondent argued that the order sought by the petitioner wife to restrain or bar the first respondent from withdrawing his savings from his EPF account is prohibited under s. 51 of

A the EPF Act 1991. As for the unit trusts, it was submitted that the statement produced by the petitioner wife relates to 2006 which is before the marriage. The Semenyih house was acquired by the first respondent and his late wife before the marriage. The petitioner wife did not stay in the Semenyih house most of the time. There is no evidence to show that the petitioner wife
B carried out any substantial improvement of the property.

[12] Learned counsel also argued that the first respondent gave the petitioner wife RM50,000 to open her new firm. After the marriage broke down in 2011, the relative needs and means of the parties have changed. The first respondent is retired while the petitioner wife runs her own firm.
C Learned counsel also argued that there was inordinate delay in the filing of the petition and no reason was given as to the delay for the filing of this application.

Decision

D *Prayer 3(a) – EPF Monies*

[13] Insofar as prayer 3(a) is concerned, we agree with the decision of the learned judge that the petitioner wife's prayer to restrain the first respondent from withdrawing his savings from his EPF account is unsustainable in the light of s. 51 of the EPF Act 1991 which provides that contributions and
E deposits are not to be assigned or attached.

Prayer 3(c) – Unit Trusts

[14] As for the unit trusts under prayer 3(c), the unit trust statement referred to us at the hearing is a statement dated far back in December 2006
F as to have no probative weight in support of the petitioner wife's contention. Further, on perusing the appeal record we agree with the learned judge that there is no evidence to show that the first respondent husband is about to or had taken any steps to dissipate the unit trust.

Prayer 4(a) – Semenyih House

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[15] The Semenyih house, the subject of prayer 4(a), was purchased before the first respondent married the petitioner wife. After considering the submission of parties, we do not think that there is any misdirection on the law or on the facts by the learned judge. We are constrained to agree that there is no evidence to support the assertion that the first respondent had or
H was about to dissipate the property.

Prayer 4(b) – Capsquare Condominium Unit

[16] Insofar as the Capsquare Condominium unit under prayer 4(c) is concerned, we are not persuaded that the learned judge erred in arriving at
I her finding. The property in question is registered in the joint names of the parties hereto and it is also presently charged to CIMB Bank. As such, it is impossible for the first respondent to dissipate the property in question without the consent of the petitioner wife.

Prayer 5 – Interim Maintenance

[17] We now turn to the last order sought under prayer 5 – the claim for interim maintenance.

[18] In dismissing the claim for interim maintenance, the learned judge referred to two cases. In *Shireen Chelliah Thiruchelvam v. Kanagasingam Kandiah (supra)*, no petition was filed; the application for maintenance was made by originating summons and the alleged adulterer was the wife. In *V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie (supra)*, the marriage was not consummated, the parties never lived together as husband and wife, the wife was never given any maintenance by her husband. Further, the application for interim maintenance was made seven years after the husband had filed the divorce petition. We agree with the submission of the petitioner wife that the aforesaid cases are distinguishable on the facts and therefore inapplicable to the present case.

[19] In *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* (*supra*), the Court of Appeal held that the trial judge erred when he ruled that he had no jurisdiction to entertain the wife's application for maintenance during the course of matrimonial proceedings.

[20] In *Chung Fui Chu v. Foo Ho Cheng & Another Case* (*supra*), the petitioner was a housewife and had not been working for 12 years. She stayed at home to take care of the two children of ages 11 and 10 years. The High Court Judge held that she cannot be expected to quickly go out and look for a job just because the marriage broke down and the respondent was reluctant to pay her an adequate maintenance.

[21] We associate ourselves with the decision of the Court of Appeal in *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* (*supra*) that the High Court has the jurisdiction to grant interim maintenance during the course of matrimonial proceedings. We do not think that it is necessary for the court to decide the issue of whether the alleged adulterous relationship between the first and second respondents led to the breakdown of the marriage before considering the question whether the petitioner wife is entitled to any interim maintenance. What is in issue is whether in all the circumstances the petitioner wife should be left high and dry without any interim maintenance pending the matrimonial proceedings. We think not. As such, the court shall now consider the means and needs of the parties based on the affidavit evidence.

[22] As adverted to in the preceding paragraphs, the petitioner wife's needs and means have been amply made out on the affidavit evidence. We are constrained to hold that there was a failure on the part of the learned judge to judicially appreciate the evidence and that her decision dismissing prayer 5 should be set aside.

[23] Be that as it may, we do not think that in all the circumstances the petitioner wife's claim for interim maintenance of RM15,000 per month is entirely justified or reasonable. As a starting point, it is useful to reiterate that the term maintenance in ss. 77 and 92 of the LRA 1976 should be construed widely as it signifies any form of material provision that will enable the wife and children, if any, to be placed in a position to enjoy the same standard of living as they did during the subsistence of the marriage (see *Parkunan Achulingam v. Kalaiyarasy Periasamy* [2004] 7 CLJ 175, 179).

[24] In deciding the amount of maintenance to be awarded to the petitioner wife, the court must take into account the means and needs of the parties. In assessing the means and needs of the parties, the court has always had regard to the following factors:

(i) the duration of the marriage;

(ii) whether there are any children of the marriage, the age of the parties;

(iii) whether the husband had financially supported the wife during the subsistence of the marriage;

(iv) the parties earning capabilities; and

(v) whether the divorce would have affected the husband's position financially.

(see *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 CLJ 105 at 116 and 118).

[25] In this instance, the parties have been married on 29 June 2010; as the date of the hearing of the appeal, they would have been married for close to five years. There are no children of the marriage. During the subsistence of the marriage, the first respondent husband financially supported the petitioner wife. According to the petitioner wife, the first respondent paid her maintenance as follows:

21 July 2011 - RM50,000 (payment in arrears for July 2010 to July 2011)

6 August 2011 - RM2,000

29 August 2011 - RM5,000

30 September 2011 - RM3,000

24 October 2011 - RM3,500

2 December 2011 - RM3,400 (for November month)

In addition, the petitioner wife's medical expenses at a private hospital were provided by the first respondent. In support of her contention, we were referred to her bank statements evidencing said payments (RR3 at pp. 427 and 428).

[26] During the subsistence of the marriage, the petitioner wife was practising as an advocate and solicitor while the first respondent was an engineer with Petronas. However, the petitioner wife stopped working for nine years after the marriage.

[27] The petitioner wife referred to her payslip dated 31 January 2011 in rekod rayuan 3 at p. 593. She stopped working and became a housewife for nine years after the marriage because the first respondent asked her to stop working and promised to take care of her and her financial needs. The first respondent gave her maintenance until their separation in December 2011 as indicated by her bank statement dated 30 September 2011 (RR3 at pp. 427-429). She also set out her fixed monthly expenses of about RM4,056.52 a month and exhibited the relevant supporting documents (RR2 p. 360 para. 65; RR3 at 430-437).

[28] The petitioner wife also said she was in financial straits as she did not get any maintenance after December 2011, so much so that in February 2012 she had to withdraw her EPF savings in account 2 to pay the housing loan leaving a balance of RM906.60 (RR2 at p. 279, paras. 41 and 42; RR3 at pp. 411, 431, 505-596).

[29] After the separation, the petitioner wife argued that she was forced to look for work but was not successful. Eventually, she obtained a loan of RM8,000 from her brother to start her legal practice (RR3 at p. 429). Her expenses for her firm for January and February 2012 amounted to RM6,251 (RR3 at pp. 415-416). She operated her legal practice from home as she was unable to cover the rental costs. Operating from home had its drawbacks including the difficulty of attracting clients. For the financial year ended 2012, the petitioner wife's legal practice showed a net profit (after deduction of operating expenses) of RM10,244 only (RR3 at 413). For financial year end 2013, the net profit was RM13,051 only. These facts are not disputed by the first respondent. In short, the petitioner wife's assertion is that her earnings are meagre and unsustainable without any maintenance from the first respondent. She said that her life is like: "kais pagi makan pagi dan kais petang makan petang." As such, it is impossible for her to enjoy the same standard of living of an upper middle class as she did during the marriage.

[30] The fact that the first respondent was the Country Chairman for Petronas Cari Gali Uzbekistan with a monthly income of RM80,000 since 2010 is not disputed. Between 2005 to 2013, the first respondent's earnings including bonuses and EPF contributions totalled RM12,809,048.45.

[31] According to the first respondent's affidavit dated 11 September 2013, he retired from Petronas on 21 June 2013 at the age of 55 and is not working (RR2 at 379, para. 22). However, he did not disclose the fact that he had been working as a Chief Marketing Officer in a company known as Oil and Gas

Gryphon Energy since August 2013. The first respondent can afford to buy health insurance where the annual premiums are RM36,075 and RM9,500 respectively (RR3 at 580-581). The first respondent is also a member of the Royal Port Dickson Yacht Club. In addition, the first respondent and the second respondent have gone to Samarkand and Paris together.

[32] Even though the first respondent was served with a notice to produce relating to his income and other financial information, the first respondent has refused to produce any documents. He has even refused to produce his EPF statement; the said non-disclosures are material non disclosures relating to the first respondent's financial situation. The material non-disclosure indicates that the first respondent is deliberate, dishonest and lacking *bona fides*. Meanwhile, it is not seriously disputed that the first respondent is also supporting an illegitimate child, a mistress, his mother and a lavish lifestyle of up to RM10,986 a month. In all the circumstances, we think that the court is entitled to draw an adverse inference with regard to the first respondent's income and other financial information on account of his failure to make full and frank disclosure (s. 114(g) of the Evidence Act 1950).

[33] We also note that there was no submission from the first respondent on whether the divorce has affected the husband's position financially. Accordingly, we hold that that there is no effect on the first respondent's financial position.

[34] Having carefully considered all the aforesaid circumstances and the means and needs of the petitioner wife and the first respondent husband, we are of the view that a monthly sum of RM8,000 is a fair and reasonable sum as interim maintenance pending the hearing and disposal of the petition. At any rate, after the hearing of the petition the High Court will be the final arbiter of the amount of the maintenance to be awarded to the petitioner wife, if any.

[35] In conclusion, the appeal is allowed in part. The decision of the High Court dismissing prayers 3(a), 3(c), 4(a) and 4(b) is affirmed. The decision of the High Court dismissing prayer 5 is set aside. We order that the first respondent pay interim maintenance of RM8,000 per month to the petitioner wife with effect from the date of our decision; the first interim maintenance to be paid within seven days into the petitioner wife's bank account and thereafter on monthly intervals by the seventh day of each calendar month. We also awarded costs of RM15,000 here and below to the petitioner wife.